



Atty Gen. Op. No. 10 - IB12

JOSEPH R. BIDEN, III  
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
FAX (302) 577-6630  
CRIMINAL DIVISION (302) 577-8500  
FAX (302) 577-2496  
FRAUD DIVISION (302) 577-8600  
FAX (302) 577-6499  
TTY (302) 577-5783

September 28, 2010

Dr. Margaret McKay  
League of Women Voters of Delaware  
2400 W. 17<sup>th</sup> St., Clash Wing, Lower Level, Room 1  
Wilmington, DE 19806

**RE: Freedom of Information Act Complaint  
Against Sussex County Board of Adjustment**

Dear Dr. McKay:

On August 15, 2010 you sent the Delaware Department of Justice ("DDOJ") a Freedom of Information Act ("FOIA") complaint concerning how properties under consideration for a variance or other special consideration are identified on the agendas of the Sussex County Board of Adjustment ("BOA").<sup>1</sup> You object to the BOA agenda designating the properties under consideration by road numbers instead of by the names designated for emergency response purposes. You note that in one case the description of the property was simply, "West of Road 78," which is about nine miles long, and in another case the property is described only as "Route 26," which is 23 miles long. You also complain that the BOA members and their staff "frequently violate FOIA by moving chairs away from the microphone during deliberations, so that even members of the

<sup>1</sup> Although you include a Sussex County Planning and Zoning Commission agenda with your complaint, your objections are only to the practices of the BOA, and we will treat your complaint as against only the BOA. However, our conclusions apply to the Planning and Zoning Commission as well.

public sitting in the front row cannot hear what they are saying.” On September 1, 2010 we received the BOA’s timely response. This is the DDOJ determination of your complaint pursuant to 29 *Del. C.* § 10005(e).

### **RELEVANT STATUTES**

“Agenda” is defined as including “a general statement of the major issues expected to be discussed at a public meeting[.]” 29 *Del. C.* § 10002(a). The agenda, if it has been determined, must be posted at least seven days before a public meeting. 29 *Del. C.* § 10004(e)(2).

### **DISCUSSION**

1. *Whether the agendas for public hearings adequately notify the public.*

The purpose for posting an agenda for a meeting of a public body is to alert the public so that those interested in an agenda item will know to attend the meeting. *See, Ianni v. Dep’t of Elections of New Castle County*, 1986 WL 9610, \* 6 (Del. Ch. Aug. 29, 1986). The rural roads in Sussex County are known by numbers, not names, although recently, the County has assigned names to many, if not all, of the numbered roads, as part of its 911 address system. The typical agenda item includes quite specific location information (e.g., “Route 26, 50 feet west of Route 17”). The best practice would be to use both name and number for the road designations, but we cannot say that it violates FOIA to use only the number designations, because the point of the agenda is to put the public on notice, not to answer every question about the agenda item. *See O’Neill v.*

*Town of Middletown*, 2007 WL 1114019, \*7 (Del. Ch. Mar. 29, 2007). The public has enough information from the BOA agenda to either contact the BOA for more detailed information, or to drive to the location, where the BOA has posted a sign.

BOA admits that in the two cases you mention—which are only two out of 32 on the two agendas you include with your complaint—no intersection information was included. You have not claimed that in those two cases any identifiable harm resulted from the lack of specific location description, and we note that anyone concerned with Road 78 or Route 26 could have availed themselves of several means of getting more information. The BOA's agendas do not “fail to draw the public's attention to the fact that [a] specific important subject will be treated.” *Ianni, supra*, at \*5. Therefore, even if the location descriptions in those two cases were not as fully informative as they could have been, we find no reason to take the serious step of invalidating the action taken on those two applications. While matters involving land use may affect substantial rights, *e.g. Op. Att'y Gen 05-IB15*, 2005 WL 2334344, \*4 (Del. A.G. June 20, 2005), “[n]ot every failure to comply with precision to the terms of [FOIA] will involve substantial public rights and thus not every technical violation will support either a declaratory judgment or, more importantly, injunctive relief.” *Ianni, supra*, at \*6.

2. *Whether deliberations are conducted in a way that excludes public monitoring.*

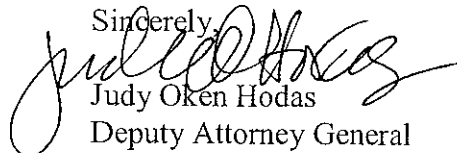
You also assert that the BOA violates FOIA by sometimes during deliberations, conducting conversations with each other and with staff, in a manner that does not allow

Dr. Margaret McKay  
September 28, 2010  
Page 4

the public to hear the discussion. A meeting of a public body means a meeting of a "quorum of the members," 29 *Del. C.* § 10002(b), and, as a general matter, conversations with each other or with staff do not need to be public unless they include a quorum of the members. You do not say whether observers who cannot hear the deliberations have made the issue known to the BOA and been ignored. For example, it *might* violate FOIA if the public "repeatedly asked [Board] members to speak louder and more clearly into the microphone." *Sovich v. Shaughnessy*, 705 A.2d 942, 946 (Pa. Cmmw. 1998) (cited in *Op. Att'y Gen. 04-1B13*, 2004 WL 1302218, \*3 (Del. A.G. June 1, 2004)). But, absent some evidence that the members knowingly avoid public monitoring of the deliberations of the quorum, there is no basis on which to find that FOIA has been violated.

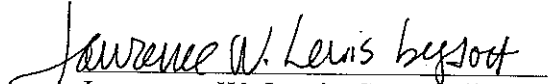
### CONCLUSION

The Sussex County Board of Adjustment has not violated FOIA in its manner of describing in the agendas properties that have applied for code exceptions. There is not sufficient evidence to determine that the members of the Board of Adjustment violate FOIA by sometimes moving away from the microphones and out of the hearing of the public.

Sincerely,  
  
Judy Oken Hodas  
Deputy Attorney General

Dr. Margaret McKay  
September 28, 2010  
Page 5

APPROVED:

  
Lawrence W. Lewis, State Solicitor

cc: FOIA Coordinator  
Richard E. Berl, Jr., Esquire